INCHCAPE (M) HOLDINGS BHD.

v.

R.B. GRAY & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[ORIGINATING MOTION NO. A48 OF 1981]
27 JANUARY 1984

LABOUR LAW: *Wrongful dismissal - Reference to Industrial Court - Jurisdiction - Whether respondent a "workman" - Application to reverse finding of Industrial Court on the ground it was wrong - Decision final and conclusive.*

ADMINISTRATIVE LAW: *Certiorari - Finding of Industrial Court - Application for an order to quash - Delay - Effect of - Whether Industrial Court should be restrained from proceeding with hearing.*

The services of the 1st respondent were terminated by the applicant. The 1st respondent applied under s. 20, Industrial Relations Act 1967 (Revised 1976) ("the Act") to the Director-General for Industrial Relations for re-instatement on the ground of wrongful dismissal. On no settlement being reached, the matter was referred to the Industrial Court for an award under s. 20(3) of the Act. The applicant raised a preliminary point that the 1st respondent was not a "workman" under s. 20 of the Act and that therefore the Industrial Court had no jurisdiction to deal with the dispute. The Industrial Court however found the 1st respondent to be a "workman". The applicant applied by originating motion for orders of prohibition and *certiorari.*

Held:

[1] The application for an order of *certiorari* had lapsed as it was made more than six weeks after the finding of the Industrial Court.

[2] The Industrial Court had jurisdiction to hear the reference. It was not open to the applicant to challenge the jurisdiction of the Industrial Court on the ground that the 1st respondent was not a workman after the dispute had been referred by the Minister under s. 20(3). Once such a reference has been ordered and the order of the Minister had not been set aside, the Industrial Court is seized with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction.

[3] The question of whether the 1st respondent was a workman could still be pursued in the Industrial Court as the Industrial Court had to consider and determine the question whether the 1st respondent was a workman for the purpose of determining whether he was entitled to reinstatement.

[4] As the Industrial Court had already made a finding that the 1st respondent was a workman it was not open to the applicant to ask the High Court to reverse that finding on the ground that it was wrong. The decision was final and conclusive under s. 33B(1) of the Act. The power of the High Court to interfere in the decisions of the Industrial Court is limited. The applicant could have asked for a ruling that the Industrial Court's finding was a nullity. He had not, however, asked for such a ruling.

[Application for prohibition and certiorari dismissed.]

Cases referred to:
Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 AC 147
Assunta Hospital v. Dr. A. Dutt [1981] 1 MLJ 115

Legislation referred to:
Industrial Relations Act 1967, ss. 2, 20, (1), (3), 33B(1)

For the applicant - C. V. Dass; M/s. Shook Lin & Bok
For the 1st respondent - D.P. Xavier; M/s. D.P. Xavier & Co.

JUDGMENT

Wan Hamzah J:

The first respondent received a letter from the applicant which was dated 3 December 1979 and signed by a director, the paragraph of which reads as follows:

> Further to our discussion with regard to your future, I am writing on behalf of the Board to formally give notice of termination of your employment ...

In the following month the first respondent wrote a letter to the Director-General for Industrial Relations in which he complained that he had been dismissed without just cause or excuse and asked that action be taken under s. 20 of the Industrial Relations Act 1967 (Revised 1976) so that he be reinstated. He was not a member of a trade union. The Director-General failed in his attempts to bring about a settlement and therefore the Minister of Labour and Manpower referred the first respondent's representations to the Industrial Court for an award, under s. 20(3). When the dispute came up for hearing before the Industrial Court the applicant raised a preliminary point contending that the first respondent was not a "workman" under s. 20 and consequently the Industrial Court had no jurisdiction to deal with the dispute. After hearing evidence and submissions, on 26 August 1981 the Industrial Court made a finding that the first respondent was a workman. The Industrial Court has not proceeded further to deal with the dispute, in view of this originating motion.

Having obtained the necessary leave the applicant by this originating motion applies for:

(1) an order prohibiting the Industrial Court from proceeding with the hearing of the first respondent's complaint;

(2) an order of *certiorari* to remove into this Court for the purpose of its being quashed the said finding of the Industrial Court.

In the statement supporting the originating motion only two grounds are given for the application, as follows:

(a) The first respondent who is the complainant in the said Industrial Court case is not "a workman" within the meaning of s. 2 and s. 20 of the Industrial Relations Act 1967. At all material times the first respondent was a director of the company duly appointed by the general meeting of the company pursuant to its Articles of Association and was not engaged in any dual capacity with the company; and/or

(b) The first respondent does not qualify as "a workman" for the purpose of s. 20 of the said Act in that as the director of a company he is not the type of person within the scope or contemplation of s. 20(1) for the purpose of granting the relief of reinstatement. A company director who is subject to appointment or removal by the general meeting of the company by virtue of the provisions of

the Companies Act, 1965 and the Articles of Association of the company cannot in law be reinstated by an order made in Industrial Court proceedings under the Industrial Relations Act.

Originally there was only prayer for leave to apply for the order of prohibition. When the *ex parte* application for the leave came up for the hearing on 30 July 1982 Counsel for the applicant added another prayer for leave to apply for the order of *certiorari*, and leave was granted to apply for both orders. When the application for the orders came up for hearing before me Counsel for the first respondent raised objection to the application for order of *certiorari* on the ground that leave to apply for it was made long after six weeks had lapsed since the Industrial Court made the said finding on 26 August 1981. I uphold the objection.

I now proceed to consider the application for prohibition. I must at once refer to s. 33B(1) which sets a limit to the power of the High Court to interfere with decisions of the Industrial Court. That section reads as follows:

> Subject to this Act and the provisions of s. 33A, an award, decision or order of the (Industrial) Court under this Act [including the decision of the (Industrial) Court whether to grant or not to grant an application under s. 33A(1) shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any Court.

The decision of the House of Lords in *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147, shows that when words in a statute oust the power of the High Court to review decisions of any inferior tribunal, the High Court cannot interfere except in a case in which the inferior tribunal has acted without jurisdiction or it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It should be noted that in the statement of the grounds to support this application as set out above no mention is made of any contention that the Industrial Court had acted without jurisdiction or that its decision was a nullity. However, since at the hearing before the Industrial Court the question of its jurisdiction was raised I shall deal with that issue. In my opinion, after the Minister has referred the dispute to the Industrial Court under s. 20(3) it is not open to the applicant to challenge its jurisdiction on the ground that the first respondent was not a workman.

In the case of *Assunta Hospital v. Dr. A. Dutt* [1981] 1 MLJ 115 the respondent claimed that he had been dismissed without just cause and excuse and eventually the matter was referred by the Minister to the Industrial Court. The appellant applied to the High Court for an order to prohibit the Industrial Court from adjudicating in the matter. The application was made on a number of grounds, one of which was that the respondent was not a workman under the Act. The High Court dismissed the application and on appeal the Federal Court upheld the decision of the High Court. When dealing with the ground that the respondent was not a workman the Federal Court stated as follows in its judgment:

> Subject to the steps in s. 20(2) to be taken for an expeditious settlement by conciliation and if such steps failed, the Minister may, if he thinks fit, refer the representations to the Court (i.e. Industrial Court) for an award. The discretion is with the Minister whether or not to make the reference. In the case under consideration we are not concerned with any question whether the Minister has or has not exercised his discretion correctly. If it should be such a case, the action is not to stop the Industrial Court from hearing the reference but by some application by which the order or reference can be impugned. Once the Minister decides to make the reference and his order is not set aside, the Industrial Court is seized with jurisdiction to hear the case and it is implicit in the Act that the Industrial Court must exercise that jurisdiction. Failure to do so may well result in an order for *mandamus* ... there can be, on a proper construction of this section, no doubt whatsoever that it would be a dereliction of

> duty to renounce the jurisdiction to hear the reference. In the exercise of its jurisdiction in a reference under s. 20(3), the Court has a duty to come to a first finding whether or not the claimant was or was not a workman within the definition of a workman in the Act, and secondly whether or not the workman has been dismissed without just cause or excuse .....

That ruling of the Federal Court should apply equally in the present case as it applied in that case.

Although it is not now open to the applicant to challenge the jurisdiction of the Industrial Court on the ground that the first respondent was not a workman, the applicant is not completely shut off from resisting the first respondent's claim in the Industrial Court on the ground that he was not workman. The applicant can still pursue in the Industrial Court its contention that the first respondent was not a workman and the Industrial Court should consider and determine that contention. When the Industrial Court considers and determines the question whether the first respondent was or was not a workman, it should do so not for the purpose of determining whether or not it has jurisdiction to hear the reference but for the purpose of determining whether the first respondent can be given what he asks for, i.e. reinstatement, because under s. 20 he can successfully ask for reinstatement only if he was a workman. The Industrial Court has the jurisdiction to decide correctly or wrongly the question whether the first respondent was a workman.

Now that the Industrial Court has made a finding that the first respondent was a workman it is not open to the applicant to ask the High Court to reverse that decision on the ground that the Industrial Court has made a wrong finding, because there is no provision for appealing against its decision and because its decision is final and conclusive under s. 33B(1). However, it would be open to the applicant on proper grounds to ask the High Court for a ruling that the Industrial Court's finding is a nullity. This is not what the applicant is asking for by this originating motion. The applicant has not alleged or shown that in arriving at its finding the Industrial Court had acted in bad faith, or had failed to comply with the rules of natural justice, or had failed to take into consideration any matter when it was required by the law to take into consideration, or had been influenced to arrive at the decision by the consideration of a matter which the law does not allow it to take into consideration, so as to ground a ruling of nullity.

For the above reasons I dismiss the application for order of prohibition. I have already stated that I uphold the objection of the Counsel for the first respondent on the application for order of *certiorari*, and I therefore dismiss also the application for order of *certiorari.*

Cost to the first respondent.

Also found at [1984] 1 CLJ 309